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The Federal Onshore Oil and Gas Leasing Reform Act of 1987: A Legislative History and Analysis

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INTRODUCTION

The Congress has enacted a major overhaul of the federal onshore oil and gas leasing program. This legislation was inspired by glaring examples of receipt of less than fair market value for federal oil and gas, serious problems of fraud and abuse in the noncompetitive portion of the system, frustration by many in industry over the unreliability and uncertainty in the existing program, and a projected increase in revenues through program reform. The new law, included in the Omnibus Budget Reconciliation Act of 1987,[1] is known as the "Federal Onshore Oil and

[1] Pub. L. No. 100-203 (1987).

Gas Leasing Reform Act of 1987" (Reform Act). It has broad-reaching implications for the use of federal lands and the disposition of federal resources.

The Reform Act eliminates the "known geological structure" (KGS) designation, previously used as a means of determining which lands are to be leased competitively.[2] Instead, the legislation establishes a two-tiered leasing system for federal onshore oil and gas lands.[3] Under the new law, all lands available for leasing are initially to be made available on a competitive bid basis.[4] Lands for which no bid is received or for which the highest bid is less than the national minimum acceptable bid are available for leasing on a noncompetitive basis for a period of two years.[5] At the end of this period of two years, unleased lands would again be available for leasing only through competitive sale.[6]

The new law retains some aspects of the old system, while favoring a more market-oriented, competitive approach to leasing of federal lands.[7] The Reform Act in all likelihood signals the end of the present-day simultaneous oil and gas leasing system, also known as the "lottery," which has been fraught with abuse and has given rise to fraudulent activities.[8] In addition, the new legislation is intended to provide certainty and efficiency in the leasing of federal oil and gas.

I. BACKGROUND FOR THE LEGISLATION

A. Oil and Gas Leasing on Federal Lands

The federal government owns 732 million acres, one-third of the nation's onshore land.[9] The Bureau of Land Management

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[2] The Reform Act, § 5102, to be codified at 30 U.S.C. § 226(b) (30 U.S.C.A. app. § 226(b) (1988)). The new law also eliminates the "favorable petroleum geological province" designation, previously applicable to certain lands leased under the Alaska National Interest Lands Conservation Act. *Id.* at § 5105.

[3] The Reform Act, § 5102, to be codified at 30 U.S.C. § 226(b), (c).

[4] The Reform Act, § 5102(a), to be codified at 30 U.S.C. § 226(b).

[5] The Reform Act, § 5102(b), to be codified at 30 U.S.C. § 226(c).

[6] *Id.*

[7] *See, e.g.*, 133 CONG. REC. 327-328 (daily ed. Jan. 6, 1987) (remarks of Sen. Bumpers); 133 CONG. REC. 8323-8324 (daily ed. June 18, 1987) (remarks of Sen. Melcher).

[8] *Id.*

[9] NATIONAL RESEARCH COUNCIL, KNOWN GEOLOGIC STRUCTURES UNDER THE MINERAL LEASING ACT: INTERPRETING AND APPLYING THE TERM "KNOWN GEOLOGIC STRUCTURE OF A PRODUCING OIL AND GAS FIELD" 5 (1986).

(BLM) administers oil and gas leasing programs for approximately 660 million acres for which the federal government owns the mineral rights.[10] Of this, 335 million acres are available for mineral leasing in the lower forty-eight states.[11]

At the end of fiscal year 1987, approximately 68.5 million acres, (excluding Alaska) were under federal onshore oil and gas lease.[12] This represents over twenty percent of federal lands legally available for leasing in the lower forty-eight states.[13]

Historically, over ninety-five percent of all outstanding leases have been awarded noncompetitively.[14] Most onshore oil and gas discoveries have been made on leases issued noncompetitively.[15]

At the end of fiscal year 1987, there were 80,113 outstanding federal oil and gas leases, excluding those in Alaska.[16] Of this total, approximately nine percent, or 7587 leases covering 1.7 million acres, were issued competitively. The remaining ninety-one percent, or 72,526 leases covering 66.8 million acres, were issued noncompetitively.[17]

Of the leases issued noncompetitively, most were issued under the simultaneous oil and gas leasing (SIMO) system.[18] At the end of fiscal year 1987, seventy-one percent of the outstanding leases issued noncompetitively, or 51,530 leases covering 42.4 million acres, excluding those in Alaska, had been issued under the SIMO system.[19]

B. Authority for Oil and Gas Leasing on Federal Lands

The Mineral Leasing Act (MLA) authorizes the Secretary of the Interior to lease deposits of oil and gas on much federal land.[20] Prior to its amendment during the 100th Congress, the

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[10] *Id.*

[11] *Id.*

[12] BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 58-63 (1988).

[13] *Id.*

[14] S. REP. No. 188, 100th Cong., 1st Sess. 2 (1987).

[15] *Id.*

[16] BUREAU OF LAND MANAGEMENT, U.S. DEPARTMENT OF THE INTERIOR, PUBLIC LAND STATISTICS 58-63 (1988).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Mineral Leasing Act, 30 U.S.C. § 181 *et seq.* (1986).

MLA allowed the leasing only of federal oil and gas on lands in a "known geologic structure of a producing oil and gas field."[21] On all other federal lands available for oil and gas leasing, leases could be acquired on a noncompetitive basis by the "person first making application for the lease who is qualified to hold a lease" under the MLA.[22]

Under the program prior to amendment, there were two types of non-competitive leasing established by regulation: (1) over-the-counter, and (2) SIMO.[23] Lands not within a KGS that had been leased previously were re-leased under the SIMO system, in which a lessee was randomly selected from a number of applicants participating in a lottery.[24] Lands not within a KGS never before leased and lands not receiving applications in the SIMO system were leased by application on a first-come, first-served basis, known as over-the-counter (OTC).[25]

The SIMO system started in the late 1950s when the BLM was frequently overwhelmed with many applicants seeking to lease the same tract. The system was used as a method to determine the first qualified applicant.

The MLA thus gave the Secretary of the Interior broad discretionary power to issue oil and gas leases on public lands not within any known geologic structure of a producing oil and gas field.[26] The policy of the MLA was to provide incentives to explore new, unproven oil and gas areas through noncompetitive leasing, while assuring adequate compensation to the federal government for leasing activity in producing areas through competitive bidding.[27]

When Congress initially enacted the MLA, it grappled with the best means to achieve this balance and considered various

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[21] Mineral Leasing Act, 30 U.S.C. § 226(b)(1) (1986), *amended by* 30 U.S.C. § 226(b)(1) (Supp. 1988).

[22] Mineral Leasing Act, 30 U.S.C. § 226(c) (1986), *amended by* 30 U.S.C. § 226(b)(1) (Supp. 1988).

[23] BLM Minerals Management, Noncompetitive Leases, 43 C.F.R. Part 3110 (1987).

[24] BLM Minerals Management, Simultaneous Filing, First Qualified Applicant, 43 C.F.R. Subpart 3112.4 (1987).

[25] BLM Minerals Management, Over-the-Counter Offers Requirements, 43 C.F.R. Subpart 3111.1 (1987).

[26] Udall v. Tallman, 380 U.S. 1, 4 (1965).

[27] Arkla Exploration Co. v. Texas Oil and Gas Corp., 734 F.2d 347 (8th Cir. 1984).

methods for drawing the line between competitive and noncompetitive leasing. Congress considered and rejected the use of mileage restrictions for determining where competitive leasing should take place. For example, the Congress considered the use of a twenty-mile limit from a producing well as the standard for competitive leasing.[28]

One Senator who strongly opposed the use of mileage restrictions was Senator John Kendrick (D. Wyoming), who objected on the grounds that production in Wyoming usually occurred in "clearly defined" domes or anticlines.[29] When the MLA was debated in 1918, Senator Kendrick offered an amendment, which was subsequently adopted, to draw the distinction between competitive and noncompetitive leasing on the basis of whether lands were "situated within the geological structure of a producing oil or gas field."[30] Industry spokespersons as well argued in favor of the KGS standard, and against an arbitrary mileage limitation. They indicated that competitive leasing within a KGS would better reflect the way in which oil accumulates underground since the KGS was intended to reflect the geology of the area rather than merely a mileage limit.

Congress adopted the KGS standard and left to the Secretary of the Interior the task of implementing a leasing program under the Act.[31] Over the years, implementing and defining the KGS concept has proved problematic to the Department of the Interior (DOI), and has resulted in litigation, as well as in efforts at legislative reform, as discussed below.

C. Administrative Definition and Implementation of the KGS Concept

Since 1959, DOI has defined the KGS as follows: " 'Known geological structure' '(KGS)' means technically the trap in which an accumulation of oil and gas has been discovered by drilling

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[28] 56TH CONG. REC. 657 (1918).

[29] An "anticline" is a geological structure consisting of a fold in the earth with sides sloping down from a common crest. Arkla Exploration Co. v. Texas Oil and Gas Corp., 734 F.2d 347, 351 n.7 (8th Cir. 1984).

[30] 56 CONG. REC. 657 (1918).

[31] Mineral Leasing Act, 30 U.S.C. § 226(a) (1986).

and determined to be productive, the limits of which include all acreage that is presumptively productive."[32]

In applying this definition and administering the leasing program under the applicable authorities, the DOI has considered varying factors: (1) maximizing revenues while maximizing exploration and development; (2) reducing speculation while making the nation's resources accessible and available to the public; and (3) encouraging greater competition while protecting the interests of smaller independent producers.[33] In attempting to meet these objectives, the DOI encountered several problems and has been subject to criticism in many instances.

II. PROBLEMS WITH THE FEDERAL ONSHORE OIL AND GAS LEASING PROGRAM

For many years, the federal onshore oil and gas leasing program was criticized for: (1) failing to obtain fair market value when inaccurate or restrictive KGS designations were made; and (2) allowing speculation and fraud by third parties.[34] The KGS designation process resulted in receipt by the public of less than fair market value in the Fort Chaffee and Amos Draw cases[35] and caused substantial uncertainty in the leasing program. The SIMO lottery led to allegations of speculation and fraud.[36]

A. The KGS

Problems in determining the extent of the KGS created significant difficulties for the federal onshore oil and gas leasing program. Because the KGS was the standard for determining whether lands would be leased competitively or noncompetitively, faulty geological analysis and rigid administrative practices relating to KGS designations sometimes yielded results which were not

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[32] E. Finley, *The Definition of Known Geological Structures of Producing Oil and Gas Fields*, in U.S. GEOLOGICAL SURVEY, CIRCULAR No. 419 at 1 (1959); BLM Minerals Management, 43 C.F.R. § 3100.0-5(l) (1987).

[33] U.S. GENERAL ACCOUNTING OFFICE, ISSUES SURROUNDING CONTINUATION OF THE NONCOMPETITIVE OIL AND GAS LOTTERY SYSTEM 5 (GAO/RCED-85-88, 1985).

[34] S. REP. No. 188, 100th Cong., 1st Sess. 2 (1987).

[35] *Id.* at 2-3.

[36] *Id.* at 3.

in the public interest.[37] The imprecision involved in the KGS determination resulted in some instances in a failure to lease competitively lands which were later found to contain valuable mineral deposits and for which a high level of competitive interest existed.[38]

Historically, the KGS concept was narrowly construed.[39] Under the old system, the DOI identified a KGS based on geological data and the location of producing wells. Because of continuing deficiencies in making geological determinations with respect to the KGS, leases which should have been issued competitively to the highest bidder were instead issued noncompetitively for the minimal filing fee.[40] Available geological data were often not analyzed in setting the KGS boundaries, and the DOI was not always aware of all wells that had been drilled in surrounding areas.[41]

Two notorious examples of the problems with KGS designations which resulted in failure to obtain fair market value for the leased minerals occurred at Fort Chaffee and Amos Draw.

1. Fort Chaffee

In 1979, the DOI awarded noncompetitive leases for $1 per acre on 33,000 acres within the Fort Chaffee military reservation in Arkansas.[42] The lands involved were not designated as being within a KGS, although surrounding areas were highly productive. The Senate Committee on Energy and Natural Resources received testimony that some of the Fort Chaffee lands would have brought $500 per acre had they been leased competitively.[43] In 1980, 24,000 acres of land adjoining the Fort Chaffee leases were leased competitively for approximately $1,705 per acre.[44] Instead of the U.S. Treasury receiving $24,000, (the noncompetitive rate), the federal

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[37] *See generally id.* at 2.

[38] *See infra* notes 57-61 and accompanying text.

[39] S. REP. No. 412, 99th Cong., 2d Sess. 5 (1986).

[40] H.R. REP. No. 378, 100th Cong., 1st Sess. 8 (1987).

[41] U.S. GENERAL ACCOUNTING OFFICE, ISSUES SURROUNDING CONTINUATION OF THE NONCOMPETITIVE OIL AND GAS LOTTERY SYSTEM 3 (GAO/RCED-85-88, 1985).

[42] S. REP. No. 188, 100th Cong., 1st Sess. 2 (1987).

[43] S. REP. No. 793, 96th Cong., 2d Sess. 3-4 (1980).

[44] S. REP. No. 188, 100th Cong., 1st Sess. 2 (1987).

government received $43 million, with $21.5 million of this amount paid to the state.[45]

The Fort Chaffee case was an extreme example of the KGS gone awry. The case involved what is known as "pent up" lands, or lands which had been withheld from oil and gas leasing. Because of their status as acquired military land, the Fort Chaffee lands had not, prior to 1976, been available for leasing.[46] As soon as Congress passed legislation authorizing the Secretary of the Interior to issue mineral leases for acquired lands within military reservations, over 800 lease applications were filed for lands in military reservations throughout the United States.[47] Thus, shortly after the Federal Coal Leasing Amendments Act of 1976 made the Fort Chaffee lands available for oil and gas leasing, applications for twenty leases covering approximately 33,000 acres were submitted to the DOI.[48]

Because of the administrative procedure used by the DOI, Fort Chaffee lands were not included as part of a KGS. Prior to leasing, lands had to be "clearlisted," or certified as not within a KGS.[49] In designating the KGS, a map was maintained in the local BLM office which contained well numbers and the production depth for producing wells. In using a "step-out process," BLM officials considered only sections adjacent to producing wells

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[45] *Id.* Pursuant to the MLA, a state (other than Alaska) is entitled to fifty percent of monies received from sales, bonuses, royalties, and rentals due to the leasing of federal lands under the MLA within the state's borders. 30 U.S.C. § 191 (1986).

[46] Congress had generally extended the provisions of the MLA to "include all lands heretofore or hereafter acquired by the United States to which the 'mineral leasing laws' have not be extended. . . ." when in 1947 it enacted the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 351 (1986). However, Congress explicitly excluded acquired lands "set apart for military or naval purposes," 30 U.S.C. § 352 (1986), such as including the Fort Chaffee lands. The Congress eliminated this military and naval exemption effective August 4, 1976. Federal Coal Leasing Amendments Act of 1976, Pub. L. No. 94-377, Sec. 12, 90 Stat. 852 (1976).

[47] *Oil and Gas Leasing of Lands Belonging to Fort Chaffee, Arkansas: Hearings Before the Subcomm. on Energy Resources and Materials Production of the Senate Comm. on Energy and Natural Resources*, 96th Cong., 1st Sess. 52 (1979) (statement of Donald P. Truesdell, Acting Assistant Director for Energy and Mineral Resources, Bureau of Land Mangement).

[48] Arkla Exploration Co. v. Watt, 562 F. Supp. 1214, 1216 (W.D. Ark. 1983), *aff'd sub nom.* Arkla Exploration Co. v. Texas Oil and Gas Corp., 734 F.2d 347 (8th Cir. 1984).

[49] Arkla Exploration Co. v. Texas Oil and Gas Corp., 734 F.2d 347, 352 (8th Cir. 1984).

for expanding the KGS, based on the state well spacing unit.[50] As a result, the BLM did not consider any lands in the interior of Fort Chaffee for possible inclusion in a KGS.[51] In the Fort Chaffee case, and under the then-prevailing administrative interpretation, a KGS was expanded only if the BLM official thought that the area would produce from the same specific trap, pool or reservoir from which production was occurring in the adjacent section.[52]

Litigation ensued, and the Federal District Court for the Western District of Arkansas found that the BLM had failed to use relevant and important geological information in the clearlisting process.[53] The court ruled that the clearlisting procedure was arbitrary and the leases were invalidated.[54]

The Court of Appeals for the Eighth Circuit affirmed the District Court decision[55] and found not only that relevant geological information had been inadequately considered by the BLM, but that competitive interest should also have been taken into account.[56]

2. Amos Draw

Another example of the serious problems inherent in the KGS designation process occurred in the Amos Draw area of northeast Wyoming. In 1983, fourteen leases totaling 11,012 acres were issued noncompetitively through the lottery. BLM's KGS "step-

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[50] *Id.* at 351.

[51] *Id.*

[52] Arkla Exploration Co. v. Watt, 562 F. Supp. 1214, 1222 (W.D. Ark. 1983), *aff'd sub nom.* Arkla Exploration Co. v. Texas Oil and Gas Corp., 734 F.2d 347 (8th Cir. 1984).

[53] 562 F. Supp. at 1223.

[54] *Id.* at 1227.

[55] 734 F.2d at 349.

[56] The Court of Appeals for the Eighth Circuit stated:

> In short, the Department did not do its homework before it classified the Fort Chaffee lands as non-KGS under an arbitrary mileage rule and granted these leases. These actions were taken without consideration of such "relevant factors," [citation omitted] as available geologic data and actual competitive interest. Based on our review of the administrative record as amplified and explained by the proceedings in the district court, we hold that these Secretarial actions are unlawful.

734 F.2d at 361.

out" process[57] resulted in four separate KGS's which covered 3,760 acres in the vicinity involved. After the leases were issued, BLM obtained geological data demonstrating a common reservoir under all four KGS's. On November 23, 1983, BLM consolidated these KGS's into one large KGS covering 28,755 acres. This large KGS encompassed all fourteen leases.[58] The government collected only approximately $13,000 in rental fees and $1.2 million in lottery applications. The lease winners reportedly resold the leases for fees estimated between $50 and $100 million.[59] Of the fourteen lease winners, only four would provide information to the DOI on the amount received when they resold the leases.[60] The General Accounting Office (GAO) estimated that a competitive sale would have generated at least $13 million more on four of the fourteen leases where resale values had been identified.[61]

3. Uncertainty in the Program

Problems with the KGS designation system resulted in uncertainty in the federal onshore oil and gas leasing program. As the House Committee on Interior and Insular Affairs noted, "This uncertainty threatens the stability of the program and calls into question its ability to contribute to the energy needs of the Nation as well as provide for a fair rate of return to the public from the

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[57] The "step-out" process was the incremental extension of a KGS, often based on the state's spacing unit for oil and gas wells.

[58] U.S. GENERAL ACCOUNTING OFFICE, ISSUES SURROUNDING CONTINUATION OF THE NONCOMPETITIVE OIL AND GAS LOTTERY SYSTEM 12 (GAO/RCED-85-88, 1985).

[59] S. REP. No. 188, 100th Cong., 1st Sess. 2-3 (1987).

[60] For these four leases, the amount obtained by the government in filing fee receipts and the amounts subsequently received by the lease winners when the leases were assigned are set forth below:

Lease No.	Filing Fee Receipts	Value Received from Assignee
W-84919	$ 34,425	$ 135,000
W-84932	$ 86,525	$ 7,700,000
W-84936	$102,000	$ 5,760,000
W-84937	$ 24,000	$ 138,000
TOTAL	$347,250	$13,633,355

U.S. GENERAL ACCOUNTING OFFICE, ISSUES SURROUNDING CONTINUATION OF THE NONCOMPETITIVE OIL AND GAS LOTTERY SYSTEM 31 (GAO/RCED-85-88, 1985).

[61] *Id.* at 4.

development of federally owned resources."[62] Because of problems with the KGS designation process, as well as other difficulties, the DOI was forced to suspend leasing under certain circumstances. As one DOI official noted, "The intermittent shutdowns that have occurred within the program since 1979 have not allowed for a predictable and stable program."[63]

Problems with the KGS resulted in the DOI's extreme caution with respect to KGS designations. The DOI had many thousands of acres under study for inclusion in KGS's. It suspended leasing on those acres pending completion of the review. This caused the industry to complain about acreage being "blocked up" and unavailable for leasing.[64]

In addition, the KGS designation process gave rise to uncertainty and litigation when the status of certain lands changed during the lease application process. For example, in *McDade v. Morton*,[65] land which had been available on a noncompetitive basis was designated as within a KGS upon the receipt of additional geological information received after the lease offer had been filed, but before its acceptance.[66] In *McDade*, the court ruled the DOI was authorized to reject the offer. Similarly, in *Bender v. Clark*,[67] the plaintiff filed a noncompetitive oil and gas offer for certain public lands in New Mexico.[68] However, before the lease was issued, the Department determined the land was within an undefined KGS, and BLM rejected the plaintiff's offer. The court upheld the Secretary's action in that case.[69]

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[62] H.R. REP. No. 378, 100th Cong., 1st Sess. 8 (1987).

[63] *Oversight Hearing on Federal Onshore Oil and Gas Leasing Program Before the Subcomm. on Mining and Natural Resources of the House Comm. on Interior and Insular Affairs*, 99th Cong., 1st Sess. 19 (1985) (statement of J. Steven Griles, Acting Assistant Secretary, Land and Minerals Management).

[64] *Hearing on S. 66 and S. 1388 Before the Subcomm. on Mineral Resources Development and Production of the Comm. On Energy and Natural Resources*, 100th Cong., 1st Sess. 113 (1987) (statement of Kenneth A. Wonstolen, Executive Director and General Counsel, Independent Petroleum Ass'n of Mountain States).

[65] 353 F. Supp. 1006 (D.D.C. 1973).

[66] *Id.* at 1007-09.

[67] 744 F.2d 1424 (10th Cir. 1984).

[68] *Id.* at 1425.

[69] *Id.* at 1430.

B. The SIMO Lottery

The SIMO lottery has been widely criticized for encouraging speculation and fraud.[70] Criticism has centered around the fact that companies have misrepresented to the public the chance of winning leases, the value of leases, and the likelihood of industry interest in buying leases from members of the public should they win in the lottery.[71]

There were also questions as to the legality of the lottery itself. Nowhere in the MLA was the lottery specifically authorized. On April 7, 1980, the Department of Justice wrote a memorandum for the Solicitor of the DOI stating that while federal law should not be construed to prohibit the lottery, "the issue is a close one and . . . persuasive arguments can be made on either side."[72] The memorandum also stated that the SIMO system may "indirectly engender the type of activity at which anti-lottery laws were aimed."[73] It went on to recommend that the Department of the Interior seek specific authorization for the lottery program.[74]

In addition to providing an opportunity for fraud, the lottery also encouraged speculation.[75] In a 1985 analysis, the Government Accounting Office (GAO) concluded that "the system itself, whether operating properly or not, inherently invites speculator participation."[76] The GAO further noted the following effects of speculation:

1. Speculators are often viewed as an impediment to industry and timely oil and gas development;

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[70] S. REP. No. 188, 100th Cong., 1st Sess. 3 (1987).

[71] *Id.*

[72] S. REP. No. 793, 96th Cong., 2d Sess. 8 (1980).

[73] *Id.*

[74] *Id.*

[75] One method of abusing the lottery system was flooding the lease drawing with applications. Under this scheme, middlemen who had made contact with companies seeking leases used lease application cards pre-signed by members of the public for submission in the lottery. The same individuals who allowed their names to be used on the lease application cards also executed assignment cards. Thus, leases won in the lottery were assigned to the middlemen who in turn assigned the leases to the company making the initial request. S. REP. No. 793, 96th Cong., 2d Sess. 7 (1980).

[76] U.S. GENERAL ACCOUNTING OFFICE, ISSUES SURROUNDING CONTINUATION OF THE NONCOMPETITIVE OIL AND GAS LOTTERY SYSTEM 36 (GAO/RECD-85-88, 1985).

2. Filing services may mislead people into spending their personal savings to speculate on generally worthless oil and gas holdings; and

3. For a nominal investment, speculators often receive revenue that should more properly be going to the federal and state governments.[77]

According to the GAO, during fiscal year 1983, over fifty percent of lottery filings came from filing service initiatives.[78]

Numerous criminal investigations, prosecutions, and convictions have resulted from fraud and abuse of the lottery. For example, two fugitives who defrauded individual investors of over $150,000 were arrested in Lakeland, Florida. These investors were individuals who wanted to participate in the SIMO lottery.[79]

Another instance of fraudulent activity under the federal onshore oil and gas leasing program was the "forty acre merchant problem."[80] Under this scheme, individuals obtained leases which contained no known oil or gas resources, divided them into parcels of forty acres, and sold them using false promises of a high return.[81] In 1976, the GAO recommended that lease assignments of less than 640 acres be prohibited. A GAO investigation found that a single 2,560-acre lease had been divided into forty-nine separate leases and assigned to separate parties.[82] This resulted in forty-nine times the paper work for the DOI. In addition, development was virtually prohibited because the units were too small

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[77] *Id.* at 37.

[78] *Id.* at 38. (Filing services are organizations which make lottery filings on behalf of individual participants.).

[79] OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF THE INTERIOR, SEMI-ANNUAL REPORT 8 (October 1987).

[80] The lottery system has also given rise to extensive civil litigation. For example, in Ballard E. Spencer Trust, Inc. v. Morton, 544 F.2d 1067 (10th Cir. 1976), the court rejected the plaintiff's offer for oil and gas leases where the offer failed to set forth the corporate qualifications on an entry card as required by regulation. The offer also failed to set forth the serial number. The Secretary took this action even though the corporate qualifications were on file with the BLM. In Cranston v. Clark, 767 F.2d 1319 (9th Cir. 1985), a disappointed bidder brought suit challenging the lottery result. In that case, the application for the noncompetitive lease was ruled not to be a multiple filing that violated Department regulations.

[81] H.R. REP. No. 378, 100th Cong., 1st Sess. 8 (1987).

[82] S. REP. No. 793, 96th Cong., 2d. Sess. 3 (1980).

to justify drilling, and a large number of lessees would have to be contacted to acquire sufficient acreage.[83]

III. ADMINISTRATIVE INITIATIVES

The DOI, in response to the problems with the federal onshore oil and gas leasing program, took several actions to reform the system administratively. For instance, the DOI tightened procedures for establishing KGS's, improved procedures for screening lands prior to leasing, and assigned additional employees to aid in reevaluating existing KGS's.[84]

The program was actually suspended several times as a result of administrative problems. For example, on February 29, 1980, the Secretary of the Interior suspended onshore noncompetitive oil and gas leasing due to allegations of widespread abuse.[85] The lottery was suspended again in October of 1983, due to problems resulting from the KGS designation process.[86]

In an effort to discourage speculation and fraud, in 1982, the Department of the Interior increased the filing fee for participation in the lottery to seventy-five dollars.[87] In addition, in 1984, the DOI imposed a requirement that the rental be paid in advance.[88]

After the problems at Fort Chaffee and Amos Draw, the DOI instituted new internal requirements with respect to KGS designations. The BLM issued Instruction Memorandum 84-35 on October 14, 1983.[89] This instruction stated that the administrative step-out was not itself a "sufficient" procedure.[90] The instruction required consideration of shows of gas or oil, acknowledged that stratigraphic accumulations could be very extensive, and stated that a closed anticline may be assumed to be presumptively pro-

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[83] *Id.*

[84] U.S. GENERAL ACCOUNTING OFFICE, ISSUES SURROUNDING CONTINUATION OF THE NONCOMPETITIVE OIL AND GAS LOTTERY SYSTEM 5 (GAO/RCED-85-88, 1985).

[85] S. REP. No. 793, 96th Cong., 2d Sess. 4 (1980).

[86] U.S. GENERAL ACCOUNTING OFFICE, ISSUES SURROUNDING CONTINUATION OF THE NONCOMPETITIVE OIL AND GAS LOTTERY SYSTEM 7-8 (GAO/RCED-85-88, 1985).

[87] *Id.* at 40.

[88] *Id.*

[89] BUREAU OF LAND MANAGEMENT, U.S. DEP'T. OF THE INTERIOR, INSTRUCTION MEMORANDUM 84-35 (October 14, 1983).

[90] *Id.* at 1.

ductive. The instruction required that all existing KGS's be reevaluated.

The DOI also issued Instruction Memorandum 84-36 in October of 1983.[91] This internal instruction emphasized the importance of clear listing, or making certain that the lands were not within a KGS prior to issuance of a lease on a noncompetitive basis.

Finally, the Department issued Instruction Memorandum 84-439 (IM 84-439) in April of 1984.[92] This instruction was designed to deal with the problem of inconsistency and the need for better documentation of KGS determinations. IM 84-439 required certain written documentation and review of KGS determinations by designated technical reviewers.

However, despite these administrative initiatives, in 1985, the GAO concluded that no actions "are likely to totally eliminate the potential for future problems—primarily because of the degree of impreciseness inherent in setting KGS boundaries and because, in some states, if industry considers its well data proprietary, they are not initially available to Interior from the state oil and gas commissions."[93]

In addition to several reviews by the GAO, additional analyses were undertaken by consultants and entities outside the DOI. As early as 1970, the Public Land Law Review Commission reported competitive sale requirements especially for oil and gas were too narrow and recommended that they be significantly increased.[94]

The Committee on Known Geologic Structure of the National Research Council conducted a study relating to the KGS and set forth the following recomendations:[95]

1. utilize more fully the discretionary powers of the Secretary;
2. revise the definition of KGS;

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[91] BUREAU OF LAND MANAGEMENT, U.S. DEP'T. OF THE INTERIOR, INSTRUCTION MEMORANDUM 84-36 (October 14, 1983).

[92] BUREAU OF LAND MANAGEMENT, U.S. DEP'T. OF THE INTERIOR, INSTRUCTION MEMORANDUM 84-439 (April 1984).

[93] U.S. GENERAL ACCOUNTING OFFICE, ISSUES SURROUNDING CONTINUATION OF THE NONCOMPETITIVE OIL AND GAS LOTTERY SYSTEM 5 (GAO/RCED-85-88, 1985).

[94] S. REP. NO. 793, 96th Cong., 2d Sess. 3 (1980).

[95] NATIONAL RESEARCH COUNCIL, KNOWN GEOLOGIC STRUCTURES UNDER THE MINERAL LEASING ACT: INTEPRETING AND APPLYING THE TERM "KNOWN GEOLOGIC STRUCTURE OF A PRODUCING OIL AND GAS FIELD" (1986).

3. strengthen information requirements and standards;

4. review KGS staffing requirements and staff development opportunities; and

5. establish stronger KGS review procedures.

The Committee concluded the KGS concept could be successfully implemented to achieve the purposes of the MLA.[96] The National Research Council Committee went on to suggest a definition for the KGS.[97] The DOI did not, however, adopt this suggested definition.

A study by Keplinger Technology Consultants, Inc., retained by BLM to review its program, concluded:

1. a significant backlog of KGS work existed in many BLM offices;

2. inadequate staffing existed;

3. there was a shortage of senior personnel with appropriate technical knowledge;

4. the KGS program tended to be subordinated to other demand workload requirements; and

5. there was a lack of standardization of procedures, which impaired quality control.[98]

Similar problems were also noted by the GAO in its 1985 report.[99] There, the GAO stated that staffing problems, data problems, and organizational and communication problems existed with respect to the KGS determination process.[100] In addi-

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[96] *Id.* at 2-4.

[97] *Id.* The suggested definition was as follows:

The "Known Geologic Structure of a producing oil and gas field (KGS)" denotes an area of land that overlies the actual or extrapolated extent of one or more traps, of whatever nature, which contain productive accumulations of oil or gas that have been confirmed by drilling and testing. The KGS may include multiple, distinct pools or accumulations the extent of which is controlled by geological structure of stratigraphy as determined by the application of professional expertise and scientifically sound evaluation of the available relevant data. The boundaries of the KGS must coincide with all legal subdivisions and well-spacing units. *Id.* at 3.

[98] KEPLINGER TECHNOLOGY CONSULTANTS, INC, REPORT TO THE DIRECTOR, EVALUATION OF THE KGS DRAINAGE PROGRAM, (September 1, 1985).

[99] U.S. GENERAL ACCOUNTING OFFICE, ISSUES SURROUNDING CONTINUATION OF THE NONCOMPETITIVE OIL AND GAS LOTTERY SYSTEM 19-20 (GAO/RCED-85-88, 1985).

[100] *Id.*

tion, the GAO concluded KGS procedures were a "significant administrative burden" on the DOI.[101]

Thus, despite efforts to deal with the KGS and lottery problems administratively, the federal onshore oil and gas leasing programs continued to be plagued by difficulties.

IV. LEGISLATIVE INITIATIVES

A. *The Ninety-second Through Ninety-eighth Congresses*

Problems in the federal onshore oil and gas leasing program inspired several legislative initiatives. As early as 1971, S. 2726 was offered by the DOI and introduced by Senator Henry Jackson (D. Washington), then Chairman of the Senate Committee on Interior and Insular Affairs.[102] The bill would have required competitive leasing in all but a few situations.

In 1973, S. 1040 was drafted by the DOI, and Senator Jackson again introduced the bill at the request of the Administration.[103] The legislation would have amended the MLA to provide for competitive leasing of all federal minerals. In that same year, President Nixon proposed a sweeping reform of the Mining Law of 1872 and the MLA. The President called for an all-competitive oil and gas leasing system.[104]

During the Ninety-sixth Congress, Senator Jackson introduced S. 902.[105] The bill directed the Secretary of the Interior to establish and implement an oil and gas leasing program for onshore federal lands. Under that legislation, the Secretary was to identify those areas which were favorable for the discovery of oil or gas. The bill stated that favorable areas were to be leased only by competitive bidding.

Also in 1979, during the Ninety-sixth Congress, Senator Jackson introduced S. 1637 at the request of the Administration.[106] The bill provided that competitive leasing was to occur on those lands which were determined to be favorable for the discovery of

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[101] *Id.* at 17.
[102] S. 2726, 92d Cong., 1st Sess. (1971).
[103] S. 1040, 93d Cong., 1st Sess. (1973).
[104] S. REP. No. 793, 96th Cong., 2d Sess. 3 (1980).
[105] S. 902, 96th Cong., 1st Sess. (1979).
[106] S. 1637, 96th Cong., 1st Sess. (1979).

oil or gas and which were within a "producing geologic province."[107] Lands outside a producing geologic province or lands within any producing geologic province which were not favorable for the discovery of oil or gas could be leased by the Secretary without competitive bidding.[108] In addition, the bill allowed the Secretary to lease lands noncompetitively prior to identification of all lands within a producing geologic province which were favorable for discovery of oil or gas. Under S. 1637, the definition of "lands favorable for discovery of oil or gas" included lands within three miles of a known geological structure.[109]

At hearings held on S. 1637,[110] Senator John Melcher (D. Montana) criticized the bill as establishing more discretion in the Secretary of the Interior and raising more doubt with respect to the onshore oil and gas leasing program. S. 1637 was considered by the Senate Committee on Energy and Natural Resources and was reported favorably with an amendment in the nature of a substitute.[111] The bill, as amended by the Committee, would have allowed leasing only on a competitive basis. Competitive bidding was to occur on the basis of those bidding systems set forth in Section 8(a)(1) of the Outer Continental Shelf Lands Act,[112] and was to be based upon the bidding systems which the Secretary determined would maximize competition. No further action was taken on the bill during the Ninety-sixth Congress.[113]

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[107] Congress adopted the "favorable petroleum geological province" standard to apply to oil and gas leasing in Alaska when it enacted the Alaska National Interest Lands Conservation Act in 1980, 16 U.S.C. § 3148 (1980).

[108] S. 1637, 96th Cong., 1st Sess. at 2 (1979).

[109] *Id.* at 3-4.

[110] *Hearing on S. 1637 Before the Subcomm. on Energy Resources and Material Production of the Comm. on Energy and Natural Resources*, 96th Cong., 1st Sess. 3 (1979) (statement of Senator John Melcher).

[111] S. REP. No. 793, 96th Cong., 2d Sess. (1980).

[112] Outer Continental Shelf Lands Act § 8(a)(1), 43 U.S.C. § 1337(a)(1) (1986).

[113] Additional legislation relating to the federal onshore oil and gas leasing program was introduced in the 96th Congress. S. 2425 was introduced by Sen. Malcolm Wallop (R. Wyoming) on March 14, 1980. S. 2425, 96th Cong., 2d Sess. (1980). The bill would have amended the MLA to direct the Secretary of the Interior to lease federal lands not within any KGS, unless the Secretary determined that it was not in the national interest to lease any such lands and the Congress approved the Secretary's determination. The bill was considered by the Energy and Natural Resources Committee on April 16, 1980, and no further action was taken. Also in the 96th Congress, Sen. Mark Hatfield (R. Oregon) introduced S. 2424, on March 14, 1980. S. 2424, 96th Cong., 2d Sess. (1980). This bill

After the events at Fort Chaffee, Arkansas, Senator Dale Bumpers (D. Arkansas) became the main proponent of federal onshore oil and gas leasing reform in the Senate. Senator Bumpers pursued the approach which had been reported favorably by the Senate Energy Committee in the Ninety-sixth Congress. In the Ninety-seventh, Ninety-eighth and Ninety-ninth Congresses, he introduced legislation which was essentially the same as that reported favorably in the Ninety-sixth Congress.[114] All of these bills provided that:

(1) leasing was to be permitted by competitive bidding only;

(2) the Secretary was directed at least once each quarter to invite public nominations of areas favorable for discovery of oil or gas; and

(3) any area available and suitable for leasing must be leased if it receives two or more nominations in any one quarter or receives a single nomination in two successive quarters.

In the Ninety-seventh Congress, S. 60 was referred to the Senate Committee on Energy and Natural Resources, was considered by the full Committee, but was rejected by a vote of eleven to eight. Senator Bumpers then proceeded to raise this provision on the floor of the Senate. The legislation was offered as an amendment to S. 1867, a bill to amend and supplement the acreage limitation and residency provision of the federal reclamation law.[115] The amendment was defeated by a vote of thirty-nine to fifty-eight. Strong opposition to the amendment was voiced by members from oil and gas producing states.

During the ninety-eighth Congress, Representative James Weaver (D. Oregon) introduced companion legislation to S. 581 in the House of Representatives. That bill, H.R. 4989, had the same basic provisions as S. 581.[116]

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would have amended the MLA to require competitive bidding in oil and gas lands set apart for military and naval purposes and to expand leasing by competitive bid to all areas within 2-1/2 miles of a KGS. Again, the bill was considered by the full committee but no further action was taken.

[114] *See* S. 373, 99th Cong., 1st Sess. (1985); S. 581, 98th Cong., 1st Sess. (1983); S. 60, 97th Cong., 1st Sess. (1981).

[115] 128 CONG. REC. 16,481 (1982).

[116] H.R. 4989, 98th Cong., 2d Sess. (1984).

B. The Ninety-ninth Congress

1. S. 2439

In the second session[117] of the Ninety-ninth Congress, Senator Bumpers adopted a new approach to leasing reform. On May 13, 1986, he introduced S. 2439.[118] The legislation set forth a two-tiered approach to federal onshore oil and gas leasing. Under the bill, lands would initially be subject to a competitive bid test. The bill specified a minimum bid of thirty-five dollars per acre.[119] Lands for which no bid was received or for which the minimum bid was not received, would become available for leasing on a noncompetitive basis for a period not to exceed one year.[120] The bill also limited assignment of small parcels and contained new enforcement provisions to address the problem of fraud and abuse in the program. The bill provided for a fixed royalty of twelve and one-half percent in amount or value of production.[121]

On June 30, 1986, the bill was reported favorably by the Committee on Energy and Natural Resources.[122] The Committee made several modifications to the bill, including lowering the minimum acceptable bid from thirty-five dollars to twenty dollars per acre.[123] The Committee reasoned that this would cause more land to be leased competitively with less falling through to the noncompetitive tier, since land receiving bids between twenty dollars and thirty-five dollars per acre would be leased competitively.

2. H.R. 1960

In the House, Representative George Miller (D. California) introduced H.R. 1960[124] in the first session of the Ninety-ninth

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[117] During the first session of the 99th Congress, Sen. Bumpers introduced legislation, S. 373, which authorized competitive bidding only on the basis of the bidding systems set forth in § 8(a)(1) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1337(a)(1) (1986).

[118] S. 2439, 99th Cong., 2d Sess. (1986).

[119] *Id.* at 2.

[120] *Id.*

[121] *Id.*

[122] S. REP. No. 412, 99th Cong., 2d Sess. (1986).

[123] *Id.* at 8.

[124] H.R. 1960, 99th Cong., 1st Sess. (1985).

Congress, with the intent of ending "the Department of the Interior's scandal-ridden noncompetitive onshore oil and gas leasing program."[125] The bill, like its predecessors, would have authorized competitive leasing using only sealed bids and based on the bidding systems set forth in the Outer Continental Shelf Lands Act.

3. H.R. 4741

During the second session of the Ninety-ninth Congress, Representative John Seiberling (D. Ohio) introduced, on May 1, 1986, H.R. 4741.[126] That bill authorized competitive leasing only and required each bidder to pay a seventy-five dollar nonrefundable filing fee. H.R. 4741 provided a procedure for the nomination of acres to be leased. Under the bill, the Secretary had discretion not to issue a lease if there was good cause to believe the highest bid did not fairly represent the lease value. The bill provided for royalties of at least sixteen and two-thirds percent in amount or value of production, and rental of not less than two dollars per acre for years one through five and not less than four dollars per acre thereafter.

In addition, H.R. 4741 contained a requirement of at least a ninety-day notice by the Secretary of the Interior to states and other interested parties prior to offering lands for lease and approving development. The bill provided that the Secretary of the Interior (or for public domain forest system lands, the Secretary of Agriculture) regulate all surface disturbance and determine reclamation requirements. The appropriate Secretary was to approve a plan of operations covering all surface-disturbing activities and was to require posting of sufficient bond prior to issuance of a permit to drill. The bill required approval by the Secretary of Agriculture prior to lease issuance on national forest lands.

H.R. 4741 would have required the completion of a land use plan prior to lease issuance. The plan was to specify any protective stipulations necessary for leasing. In addition, the Secretary of the Interior would be required to determine the suitability of lands

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[125] 131 CONG. REC. 7705 (1985).

[126] H.R. 4741, 99th Cong., 2d Sess. (1986).

for leasing. H.R. 4741 also contained provisions prohibiting leasing in certain wilderness study areas and contained provisions relating to exploration for oil and gas.

House subcommittee hearings were held on this bill on July 15 and 17, 1986, during which industry objected strongly to the environmental and land use planning provisions of the legislation.[127] In addition, industry representatives opposed the requirement of all-competitive leasing. No further action was taken on the legislation.

4. H.R. 4826

Two weeks after introduction of H.R. 4741, Representative Morris Udall (D. Arizona), Chairman of the House Committee on Interior and Insular Affairs, introduced H.R. 4826.[128] That bill provided for a two-tiered system of leasing, as did the Bumpers bill, S. 2439. All lands would initially be offered for competitive leasing with a twenty dollars per acre minimum bid. Lands for which no bid was received or for which the highest bid was less than twenty dollars per acre would be offered noncompetitively for a period not to exceed one year.

H.R. 4826 provided for royalties of not less than twelve and one-half percent in amount or value of production. The bill provided for rentals of not less than one dollar per acre in years one through five and three dollars per acre for each year thereafter.

H.R. 4826 contained provisions relating to land use planning, which required completion of a land use plan addressing oil and gas leasing except that lands could continue to be leased in the absence of such plans where the Secretary provided a report to Congress containing certain specified information. H.R. 4826 also addressed oil and gas exploration. The bill contained provisions to combat fraud and abuse as contained in S. 2439, the Bumpers bill.

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[127] *Hearing on H.R. 1960, H.R. 4741 and H.R. 4826 Before the Subcomm. on Mining and Natural Resources of the House Comm. on Interior and Insular Affairs*, 99th Cong., 2d Sess. (1986).

[128] H.R. 4826, 99th Cong., 2d Sess. (1986).

Subcommittee hearings were held on H.R. 4826 on July 15 and 17, 1986.[129] Environmentalists, while generally supportive of changes in the leasing mechanism, testified that any such changes should be accompanied by environmental and land use planning reforms. As with the Seiberling bill, industry voiced strong objections to the land use planning provisions. No further action was taken on the bill.

5. Legislation Passes the Senate

Spurred on by the impending end of the Ninety-ninth Congress, widespread frustration with the onshore oil and gas leasing program, and a feeling on the part of some industry-oriented Senators that the One Hundredth Congress might be more sympathetic to the environmental and land use planning provisions contained in the House bills, the full Senate passed a modified version of S. 2439 twice in the waning days of the Congress. Passage was preceded by a series of intense negotiations on outstanding issues of concern to industry, and in particular, to some independent producers.

As a result of these discussions, the Committee-passed version of S. 2439 was modified to provide: (1) lands would be available in the noncompetitive tier for a period not to exceed three years, as opposed to one year; (2) all lands available noncompetitively on an over-the-counter basis would continue to be available on that basis for a period not to exceed fifty months; (3) lease sales would be conducted by oral bidding only and would be held at least every two months; and (4) the Department of the Interior would be required to take certain actions in administering the program within time frames specified by the bill.

This modified version of S. 2439 passed the Senate twice as an amendment to H.R. 4645, a bill introduced by Representative Seiberling to modify the boundaries of the Cuyahoga Valley National Recreation Area.[130] The amendment[131] was offered on

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[129] *Hearing on H.R. 1960, H.R. 4741 and H.R. 4826 Before the Subcomm. on Mining and Natural Resources of the House Comm. on Interior and Insular Affairs*, 99th Cong., 2d Sess. (1986).

[130] Amdt. No. SP 3489.

[131] H.R. 4645, 99th Cong., 2d Sess. (1986).

October 17, 1986, by Senator James McClure (R. Idaho), then Chairman of the Senate Committee on Energy and Natural Resources, and was adopted by the full Senate twice by voice vote. Also included in the "package" of amendments to H.R. 4645 were provisions relating to National Park System fees and to the American Conservation Corps. Representative Seiberling had long supported the latter.

Despite the success in securing passage of the legislation by the Senate, the House failed to consider or pass the legislation in the Ninety-ninth Congress.

C. *The One Hundredth Congress*

The close of the first session of the One Hundredth Congress brought with it enactment of comprehensive legislation to reform the federal onshore oil and gas leasing program. This legislation built upon and modified several of the legislative concepts developed and considered in previous Congresses. The final product was the result of many compromises on the part of divergent interests.

Recurrent themes emerged as the One Hundredth Congress considered the legislation. Prominent among these was the continuing "widespread frustration in the oil patch" over BLM's administration of the program.[132] Independent producers testified that BLM was drawing KGS's to encompass "unjustifiably large areas, thereby backing [independents] . . . into a de facto all-competitive system."[133] According to many independents, there had been a "distortion of the KGS concept to cover entire basins, without geologic basis."[134] Further, they alleged that the DOI had reacted to criticism of the KGS process through "interminable delay" in making KGS determinations and that the DOI had failed to issue leases while KGS status was reconsidered.[135]

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[132] *Hearing on S. 66 and S. 1388 Before the Subcomm. on Mineral Resources Development and Production of the Senate Comm. on Energy and Natural Resources*, 100th Cong., 1st Sess. 123 (1987) (statement of David Schaenen, representing the Independent Petroleum Association of America and the Rocky Mountain Oil and Gas Association) [hereinafter *Hearings*].

[133] *Id.* at 124.

[134] *Id.* at 113. (statement of Kenneth A. Wonstolen, Executive Director and General Counsel, Independent Petroleum Assoc. of Mountain States).

[135] *Id.* at 112.

A resounding endorsement of a more market-oriented leasing system was provided by the DOI which noted the failings of the KGS system and the impossibility of providing an administrative remedy: "[KGS] determinations will always be questioned no matter how qualified our personnel are or the size of the budget dedicated to making those determinations. We know of no better way of identifying which lands are of sufficient value to generate competition than going to the market place."[136] The DOI also noted that a two-tiered market-oriented approach would bring "stability and predictability to the Federal onshore oil and gas leasing program."[137]

Tempering the theme of frustration over the KGS system and the momentum for reform was the recognition of economic distress in the oil patch. For example, the DOI urged that changes to the MLA be considered in the context of the depressed state of the oil industry and the existing threat to energy security.[138]

Concern over the economic state of the oil and gas industry manifested itself in the debate over the level of the minimum bid. Those favoring a high minimum bid included independents whose livelihood depended on participation in the SIMO lottery. In their view a high minimum bid would ensure continued existence of the lottery and a greater possibility that the independents could obtain the desired leases without being out-bid by major producers.[139] In addition, concern over the economic health of the industry was evident in efforts by many independents to secure an exemption from any new leasing system for lands then available for leasing on an over-the-counter basis. Independents argued that this was important in order to preserve continued industry access to frontier exploration prospects.[140]

Finally, many independents sought to have a relatively longer period for lease availability in the noncompetitive tier of the system. Again, independents felt that increased availability on a

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[136] *Id.* at 51. (statement of Robert F. Burford, Director, Bureau of Land Management, U.S. Department of the Interior).

[137] *Id.*

[138] *Hearings*, *supra* note 132, at 48-49.

[139] *Id.* at 128-29 (statement of David Schaenen, representing the Independent Petroleum Association of America and the Rocky Mountain Oil and Gas Association).

[140] *Id.* at 113 (statement of Kenneth A. Wonstolen, Executive Director and General Counsel, Independent Petroleum Association of Mountain States).

noncompetitive basis would enhance their ability to obtain desired leases.[141]

An ever-present theme in the One Hundredth Congress was concern over the budget and the federal deficit. The reform of the federal onshore oil and gas leasing system was estimated to result in budget savings by the Budget Committees and the Congressional Budget Office. The reform legislation was, therefore, an appropriate component of the Omnibus Budget Reconciliation Act of 1987. By law,[142] this bill received expedited consideration and was subject to streamlined parliamentary procedures. In addition, market-oriented, competitive bidding apparently had appeal, which a noncompetitive lottery drawing of leases lacked, to many budget-conscious members of Congress.

Finally, there were persistent and earnestly-felt arguments by environmentalists that environmental and land-use planning requirements in the federal onshore oil and gas leasing program were inadequate, and that reform in those areas was an essential component of any new legislation.[143] These arguments were met with uniform opposition by industry.[144]

Against this thematic backdrop, the Congress considered five federal onshore oil and gas leasing bills during the first session of the One Hundredth Congress, and ultimately enacted the Federal Onshore Oil and Gas Leasing Act of 1987.

1. S. 66

For the fifth consecutive Congress, Senator Bumpers introduced legislation to reform the federal onshore oil and gas leasing program. S. 66 provided for a two-tiered leasing system, as approved by the Senate during the Ninety-ninth Congress.[145] The

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[141] *Id.* at 114.

[142] *See* Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. §§ 190a-1 note, 190a-3, 190b, 190d, 601-603, 621-623, 631-642, 651-653, 661, 681-688 (1974).

[143] *Hearing on S. 66 and 1388 Before the Subcomm. on Mineral Resources Development and Production of the Senate Comm. on Energy and Natural Resources*, 100th Cong., 1st Sess., 139. (Statement of Karl Gawell, National Wildlife Federation).

[144] *Id.* at 114-15. (Statement of Kenneth A. Wonstolen, Executive Director and General Council, Independent Petroleum Association of Mountain States); *Id.* at 190. (Statement of the American Petroleum Institute).

[145] S. 66, 100th Cong., 1st Sess. (1987).

bill provided for a minimum bid of twenty dollars per acre, with Secretarial discretion to raise the minimum bid. The period of availability for noncompetitive leasing, or recycle period, was not to exceed one year, with Secretarial discretion to set the period at one year or less. The bill retained existing law on lease terms and rentals. S. 66 provided for a fixed royalty of twelve and one-half percent in amount or value of production. The bill prohibited assignments of less than 640 acres in most circumstances and contained extensive anti-fraud provisions. The DOI testified in support of S. 66 and provided favorable executive comment on the bill.[146]

2. S. 1388

On June 18, 1987, Senator John Melcher introduced legislation, S. 1388, to provide for a two-tiered oil and gas leasing system. Under that bill, the minimum bid was fixed at one dollar per acre. After lands were offered for competitive bid, all lands becoming available for leasing on a noncompetitive basis would continue to be so available until leased. All lands available on an over-the-counter basis on the date of enactment would continue to be available on that basis until leased. Rental was set at one dollar per acre and all leases were to have a ten-year primary term. Royalties were to be fixed at twelve and one-half percent in amount or value of production. S. 1388 contained the same assignment and anti-fraud provisions as S. 66. The DOI expressed concern over various provisions of the bill.[147]

3. S. 1730

The Senate Committee on Energy and Natural Resources considered onshore oil and gas leasing reform legislation on July 29, 1987 and September 23, 1987. As a result, S. 1730 was reported favorably by the Committee on September 30, 1987, as an original measure in lieu of S. 66 and S. 1388.[148] The legislation

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[146] *Hearing on S. 66 and S. 1388 Before the Subcomm. on Mineral Resources Development and Production of the Senate Comm. on Energy and Natural Resources*, 100th Cong., 1st Sess. 44, 51 (1987); S. REP. No. 188, 100th Cong., 1st Sess. 13 (1987).

[147] S. 1388, 100th Cong., 1st Sess. (1987).

[148] S. REP. No. 188, 100th Cong., 1st Sess. (1987).

was also reported to the Senate Committee on the Budget as part of the response of the Senate Committee on Energy and Natural Resources to its budget reconciliation instructions.[149]

Like S. 66 and S. 1388, S. 1730 provided for a two-tiered system of leasing. As a result of compromise, the minimum bid was set at a level of at least ten dollars per acre. The bill provided for a period of availability for noncompetitive leasing not to exceed three years. Under the bill, all lands available for leasing on an over-the-counter basis were to remain so available for a period of twenty-four months from the date of issuance of final program regulations.

The bill set rentals at not less than one dollar per acre and royalties at twelve and one-half percent in amount or value of production. The bill contained provisions authorizing the Secretary to prohibit most assignments of less than 640 acres and contained anti-fraud provisions. The bill contained no land use planning or environmental provisions.

The Congressional Budget Office estimated that S. 1730, as reported by Committee, would result in savings of $10 million in fiscal year 1988, and $20 million per year during fiscal years 1989 through 1992.[150]

4. H.R. 933

During the first session of the One Hundredth Congress, Representative George Miller introduced H.R. 933, which authorized competitive leasing only.[151] The bill provided for a leasing mechanism essentially identical to bills offered in previous Congresses, and authorized a competitive leasing system based on bidding systems provided for in the Outer Continental Shelf Lands Act.[152]

The bill set rents at not less than two dollars per acre per year in the first through fifth years of a lease and not less than four dollars per acre per year thereafter. H.R. 933 set royalties

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[149] Budget reconciliation instructions were contained in H. Con. Res. 43 (the Concurrent Resolution on the Budget for Fiscal Year 1988).

[150] S. REP. No. 188, 100th Cong., 1st Sess. 9 (1987).

[151] H.R. 933, 100th Cong., 1st Sess. (1987).

[152] *Id.*

at a fixed sixteen and two-thirds percent of value or production.

The bill would have required the Secretary to notify affected states and interested parties ninety days before offering lands for lease and at least ninety days before approving development activities. The bill required regulation of surface-disturbing activities and the establishing of standards for bonding. H.R. 933 provided that the Secretary of the Interior may not issue any lease on national forest lands without the approval of the Secretary of Agriculture. In addition, H.R. 933 contained provisions of environmental requirements and land use planning, as introduced in prior Congresses.

5. H.R. 2851

Congressman Nick Rahall (D. West Virginia) introduced H.R. 2851 on June 30, 1987.[153] The bill was amended and reported favorably by the Committee on Interior and Insular Affairs on September 23, 1987.[154] The legislation was also included as part of the Committee's budget reconciliation legislation.

H.R. 2851, as reported by the Committee, also provided for a two-tiered approach to oil and gas leasing. The bill required that all tracts initially be offered competitively, with no minimum bid. A nonrefundable bidding fee of seventy-five dollars would have been required. Tracts that received no bid were to be made available for a period not to exceed one year on a noncompetitive basis.

Under the legislation, rent would be set at not less than two dollars per acre per year in the first through fifth year of the lease and not less than three dollars per acre per year thereafter. Royalties were set at not less than twelve and one-half percent of value of production for competitive and noncompetitive leases.

H.R. 2851 provided that notice must be given at least sixty days before offering lands for lease and at least thirty days before substantially modifying the terms of any oil or gas lease. Periodic notice of pending applications for permits to drill was to be given by the Secretary.

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[153] H.R. 2851, 100th Cong., 1st Sess. (1987).

[154] H.R. REP. No. 378, 100th Cong., 1st Sess. (1987).

The bill provided for the regulation of surface-disturbing activities, required the approval of a plan of operations, and required that bonding standards be established. In addition, the bill provided that no oil or gas lease could be issued to any person who had failed to comply with reclamation requirements until that person complied with such requirements.

H.R. 2851 provided that the Secretary of the Interior may not issue any lease on public domain national forest lands without the consent of the Secretary of Agriculture. The bill contained a section requiring that land use plans be amended to include an analysis of oil and gas potential, the economic and environmental consequences of development, and identification of protective stipulations to be applied in developing the area. After a specified date, no oil and gas leases could be issued until planning requirements were met. The bill would have prohibited oil and gas leasing on certain wilderness study lands. Finally, the bill contained provisions to combat fraudulent practices.

H.R. 2851, as reported by Committee, was estimated by the Congressional Budget Office to result in savings of $10 million in fiscal year 1988, $12 million in fiscal years 1989 and 1990, and $26 million in fiscal years 1991 and 1992.[155]

6. Conference on the Legislation

As the session progressed, it became likely that the federal onshore oil and gas leasing reform legislation would be a part of the Omnibus Budget Reconciliation Act of 1987. Both the Senate Committee on Energy and Natural Resources and the House Committee on Interior and Insular Affairs had included the legislation in their budget reconciliation packages, and such legislation was subsequently passed by both houses of Congress. In addition, the Congressional Budget Office had scored both bills as achieving budget savings. As part of its work on the budget reconciliation bill, both houses of Congress designated conferees to serve on the "mini-conferences" relating to different components of the legislation. Key participants in the conference on the leasing reform component of the bill were: Representatives Rahall,

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[155] H.R. REP. No. 378, 100th Cong., 1st Sess. 17 (1987).

Miller, and Udall; and Senators Bumpers, Melcher, and Wallop.

Given the differing versions of the legislation, the conferees had several issues to resolve, including:

1. the minimum bid;
2. period of availability for noncompetitive leasing ("recycle period");
3. phase-in for over-the-counter lands;
4. land use planning;
5. notice and reclamation;
6. Secretary of Agriculture consent to leasing;
7. designation of lands not subject to leasing; and
8. lease issuance prohibition due to non-reclamation.

The conferees met over a period of three days, and in a classic example of legislative compromise, agreed to a version of reform legislation, which became the Federal Onshore Oil and Gas Leasing Reform Act of 1987.

V. THE FEDERAL ONSHORE OIL AND GAS LEASING REFORM ACT OF 1987

A. The Leasing Mechanism

The Reform Act provides for a two-tiered system of leasing. All lands to be leased are to be made available initially on a competitive bid basis. Lands not receiving the minimum bid then become available on a noncompetitive basis for a fixed period, at the end of which the lands are "recycled" and again put to a competitive test.

1. Minimum Bid

The Reform Act sets the national minimum acceptable bid at two dollars per acre for a period of two years after the date of enactment.[156] Thereafter, the Secretary may establish by regulation

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[156] The Reform Act § 5102(a), to be codified at 30 U.S.C. § 226(b)(1)(B) (1988).

a national minimum acceptable bid higher than two dollars per acre based upon certain findings related to enhancing financial returns to the United States and promoting efficient management of the resource.[157]

Reaching a compromise on the issue of minimum bid was key to securing passage of the legislation. The House bill provided for a minimum bid fixed at two dollars per acre, while the Senate version authorized the Secretary to establish a national minimum acceptable price which was to be at least ten dollars per acre. As a compromise, the Reform Act combined aspects of both the Senate and House approaches.[158]

2. Period of Availability for Noncompetitive Leasing ("Recycle Period")

Under the Reform Act, lands not receiving the minimum bid would become available on a noncompetitive basis for a period of two years after the competitive sale.[159] The House bill provided for a one year recycle period, while the Senate version provided for a three year recycle period.[160]

3. Phase-in for Over-the-Counter Lands

The Reform Act provides no phase-in[161] for over-the-counter lands. The House bill was silent on this issue. However, the Senate version had provided that OTC lands would remain available on that basis for twenty-four months. As part of the overall compromise, the Senate receded to the House on this issue.[162]

4. Other Leasing Provisions

The Reform Act provides that competitive sales are to be by oral bidding only.[163] It imposes a seventy-five dollar application

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[157] *Id.*

[158] H.R. REP. No. 495, 100th Cong., 1st Sess. 778 (1987).

[159] The Reform Act, § 5102(a), to be codified at 30 U.S.C. § 226(b)(1)(A) (1988).

[160] H.R. REP. No. 495, 100th Cong., 1st Sess. 781 (1987).

[161] A "phase-in" provision would have allowed the continued availability of OTC lands on an over-the-counter basis for a fixed period of time prior to being subject to a competitive lease sale under the new system.

[162] H.R. REP. No. 495, 100th Cong., 1st Sess. 780 (1987).

[163] The Reform Act, § 5102(a), to be codified at 30 U.S.C. § 226(b)(1)(A) (1988).

fee for leases issued without competitive bidding,[164] retains existing law with respect to the royalty rate,[165] and prospectively sets rent at not less than one dollar and fifty cents per acre for the first five years of a lease and not less than two dollars per acre thereafter.[166] Lease sales are to be held not less frequently than quarterly.[167]

B. Land Use Planning and Environmental Provisions

1. Land Use Planning

Another key to securing passage of the Reform Act was compromise on the land use planning provisions. The Senate version contained no such provisions, while the House bill did. Several Senate conferees expressed a strongly held view that the Reform Act was not an appropriate vehicle for land use planning reform. As a result, the compromise deleted the House provisions and provided for a study of the manner in which oil and gas resources are considered in land use plans.[168]

2. Notice and Reclamation

The Reform Act requires the Secretary of the Interior to post notice in the appropriate local office of the leasing and land management agency at least forty-five days before offering lands for lease and at least thirty days before approving applications for permits to drill or substantially modifying the terms of any lease.[169] This provision is similar to that contained in the House bill. The Senate bill contained no notice provision.[170] The Reform Act also requires regulation of all surface disturbing activities conducted pursuant to leasing. This includes Secretarial approval of surface disturbing activities. It also requires that adequate

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[164] *Id.*, at § 5102(b), 30 U.S.C. § 226(c)(1) (1988).
[165] *Id.*, at § 5102(a), (b), 30 U.S.C. § 226(b)(1)(A), (c)(1) (1988).
[166] *Id.*, at § 5102(c), 30 U.S.C. § 226(d) (1988).
[167] *Id.*, at § 5102(a), 30 U.S.C. § 226(b)(1)(A) (1988).
[168] H.R. REP. No. 495, 100th Cong., 1st Sess. 779 (1987).
[169] The Reform Act, § 5102(d), to be codified at 30 U.S.C. § 226(f) (1988).
[170] H.R. REP. No. 495, 100th Cong., 1st Sess. 779 (1987).

reclamation be ensured.[171] The Senate receded to the House on this issue.[172]

3. Secretary of Agriculture Consent to Leasing

Pursuant to the Reform Act, no oil and gas lease can be issued on National Forest Lands over the objection of the Secretary of Agriculture.[173] The House version required consent by the Secretary of Agriculture, while the Senate bill required only that the Secretary of Agriculture be consulted prior to leasing.[174]

4. Lands Not Subject to Leasing

Under the Reform Act, the Secretary of the Interior may not issue oil and gas leases on certain specified federal lands, including those recommended for wilderness allocation by the surface managing agency, those within BLM wilderness study areas, those designated by Congress as wilderness study areas (with certain exceptions), and certain lands allocated for wilderness and further planning.[175] The Senate version contained no such provision. Once again, as part of the overall compromise, the Senate receded to the House on this matter.[176]

5. Lease Issuance Prohibition Due to Non-Reclamation

The Reform Act also contains a provision prohibiting onshore oil and gas lease issuance to any entity that fails to reclaim a lease, or is controlled by or under common control with an entity failing to reclaim an oil and gas lease, until such time as reclamation requirements are met.[177] This provision blends the House and Senate versions.[178]

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[171] The Reform Act, § 5102(d), to be codified at 30 U.S.C. § 226(g) (1988).
[172] H.R. REP. No. 495, 100th Cong., 1st Sess. 779 (1987).
[173] The Reform Act, § 5102(d), to be codified at 30 U.S.C. § 226(h) (1988).
[174] H.R. REP. No. 495, 100th Cong., 1st Sess. 779 (1987).
[175] The Reform Act, § 5112, to be codified at 30 U.S.C. § 226-3 (1988).
[176] H.R. REP. No. 495, 100th Cong., 1st Sess. 781-782 (1987).
[177] The Reform Act, § 5102(d), to be codified at 30 U.S.C. § 226(g) (1988).
[178] H.R. REP. No. 495, 100th Cong., 1st Sess. 782 (1987).

C. *Anti-fraud Provisions*

The Reform Act adds new, broad authority to combat fraud and other infractions under the MLA.[179] Pursuant to these provisions, it is unlawful for any person to organize or participate in a scheme or plan to circumvent or defeat the provisions of the MLA or its implementing regulations.[180] In addition, the Reform Act makes it unlawful to seek to obtain, or to obtain, money or property by means of false statements concerning the value of a lease, the availability of land for leasing, the ability of any person to obtain a lease, or the provisions of the MLA or its implementing regulations.

The provision imposes criminal penalties of up to $500,000, imprisonment for not more than five years, or both, and civil penalties of not more than $100,000 per violation or other appropriate remedy. Also, the section allows states to bring civil actions against any person conducting activity within the state in violation of the section.[181]

Both House and Senate bills contained similar anti-fraud provisions. In addition, the Reform Act allows the Secretary to disapprove the assignment of areas under lease of less than 640 acres outside Alaska or of less than 2560 acres within Alaska.[182]

CONCLUSION

After several years of intensive effort by Members of Congress, executive branch officials, industry representatives and environmentalists, reform of the federal onshore oil and gas leasing program has finally become a reality. Test sales held under the new law give reason for optimism. As a result of the first eight sales, some 1.1 million acres were leased, with receipts to the government of approximately $24.8 million. The average bid on the lease parcels ranged from $4.20 per acre to $37.32 per acre.

In the course of debate on the legislation, Senator Dale Bumpers observed, "There is only one person who knows what a known

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[179] The Reform Act, § 5108, to be codified at 30 U.S.C. § 195 (1988).

[180] *Id.*, 30 U.S.C. § 195(a) (1988).

[181] *Id.*, 30 U.S.C. § 195(b), (f) (1988).

[182] *Id.*, at § 5103, 30 U.S.C. § 187a (1988).

geological structure is, and that's God."[183] While a definitive assessment of the workability of the new legislation is premature, Congress has at least done away with the known geological structure concept and, hopefully, moved from a system where, as Senator Bumpers noted, divine insight was necessary for successful administration to a system that can be administered by mere mortals.

[183] *Oversight Hearing on Federal Onshore Oil and Gas Leasing Program Before the Subcomm. on Mining and Natural Resources of the House Comm. on Interior and Insular Affairs*, 99th Cong., 1st Sess. 9 (1985) (statement of Senator Dale Bumpers, Arkansas).